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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY LEE MOSS,

Defendant and Appellant.

B212559

(Los Angeles County  
Super. Ct. No. BA336073)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Richard J. Oberholzer, Judge. Affirmed as modified.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Ricky Lee Moss (appellant) of second degree burglary. (Pen. Code, § 459.)<sup>1</sup> The jury found that the value of the property exceeded \$50,000. (§ 12022.6, subd. (a)(1).) Appellant admitted a prior conviction for a serious or violent felony. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).)

The trial court sentenced appellant to seven years in prison. The sentence consisted of the upper term of three years, doubled because of the prior strike to six years, and a consecutive year for the section 12022.6 enhancement.

Appellant appeals on the ground that imposition of the enhancement under section 12022.6, subdivision (a)(1) violated his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and must be reversed.

### **FACTS**

As mandated by the traditional rule governing appellate review, we recite the evidence in the light most favorable to the judgment. (See, e.g., *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Daisy Hoch (Hoch) rented a storage unit from B A Self Storage on Heliotrope Drive in Los Angeles during the month of December 2007. She was given an access code to the facility gates, a lock for the unit, and two keys to the lock. She kept a key and a card bearing the access code in her Nissan truck.

Appellant and Hoch were dating during the time she was liquidating the merchandise in her store. Appellant sometimes helped her move merchandise from the store to the storage unit. On January 2, 2008, appellant took the keys to Hoch's truck, saying he would be right back. When he did not return, Hoch reported the truck as stolen.

Richard Corpus (Corpus) also rented a storage unit at B A Self Storage. He kept his collectibles, including action figures, in the unit. In early January, Corpus went to the unit and locked it when he left. On January 17 or 18, 2008, he returned to the unit and

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<sup>1</sup> All further references to statutes are to the Penal Code unless stated otherwise.

saw that 30 boxes were missing. The prosecutor played surveillance footage showing someone moving Corpus's boxes down a ramp. Corpus estimated that the value of his missing collectibles was between \$50,000 or \$60,000.

Records from B A Self Storage revealed that someone used Hoch's access code to enter the facility on January 2, 2008, at 7:20 a.m. On January 3, 2008, the same access code was used to enter at 7:21 a.m. Surveillance video from January 3, 2008, showed Hoch's truck driving up the ramp into the storage facility. The video showed a person getting out of the truck and walking up the ramp. This person appeared to be appellant.

The parties stipulated that the police stopped appellant while he was driving a Nissan truck with a male passenger on January 12, 2008 at approximately 2:09 a.m. The truck, which was Hoch's, was impounded. Police found two boxed action figures in the truck, and Corpus identified them as his. Inside the truck police also found a multi-purpose tool and a long, thin, metal blade, both of which were suitable for picking locks.

## **DISCUSSION**

### **I. Argument**

Appellant points out that, effective January 1, 2008, the enhancement mandated by section 12022.6 stipulated that the stolen property had to have a minimum value of \$65,000 in order for the enhancement to be triggered. There was no substantial evidence from which a rational trier of fact in this case could infer that the property taken met this \$65,000 minimum value. In addition, the trial court instructed the jury on the lower \$50,000 figure. Therefore, constitutionally insufficient evidence supported the enhancement, and the jury never found beyond a reasonable doubt the facts necessary to impose the enhancement.

Respondent concedes that the true finding on the value enhancement should be vacated.

### **II. Proceedings Below**

Corpus testified that his former estimate of the value of his stolen property as being from \$60,000 to \$80,000 was perhaps too high. He revised the amount to \$50,000

to \$60,000. During argument, the prosecutor stated that Corpus, an expert, could not pin down the value but placed it between \$50,000 to \$60,000.

### **III. Enhancement Term Must Be Vacated**

The information alleged that appellant took property of a value exceeding \$50,000 within the meaning of section 12022.6, subdivision (a)(1). The trial court instructed the jury that, “It is also alleged in the information that in the commission of the alleged crime of burglary, the defendant took property of a value exceeding \$50,000. The People have the burden of proving beyond a reasonable doubt that the value of the property exceeded \$50,000. Unless you are convinced beyond a reasonable doubt that the defendant took property in excess of \$50,000, you must find it to be not true.”

As appellant asserts, effective January 1, 2008, section 12022.6, subdivision (a) provides: “When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows: [¶] (1) If the loss exceeds sixty-five thousand dollars (\$65,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of one year.” The former statute set the minimum loss at \$50,000. (§ 12022.6, Stats. 2007, ch. 420, §§ 1, 2.) The law in effect at the time the offenses committed is controlling. (*People v. Treadway* (2008) 163 Cal.App.4th 689, 695.) Corpus’s highest revised estimate of the value of his collectibles was \$60,000. The reasonable inference to be drawn from Corpus’s evidence and all other evidence is that appellant took the property after January 1, 2008. Therefore, there is insufficient evidence to support the true finding on the allegation under section 12022.6.

Moreover, the jury found only that the property value exceeded \$50,000. Given Corpus’s testimony, it cannot be said beyond a reasonable doubt that the jury would have found that the property exceeded \$65,000 in value had it been correctly instructed. Therefore, the true finding must be stricken and the enhancement term must be vacated.

## **DISPOSITION**

The judgment is modified by striking the true finding on the allegation under section 12022.6, subdivision (a) and vacating the term imposed under that section. As modified, the judgment is affirmed. The superior court shall have its clerk prepare and send to the California Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the modification to the judgment.

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\_\_\_\_\_, J.

DOI TODD

We concur:

\_\_\_\_\_, P. J.

BOREN

\_\_\_\_\_, J.

ASHMANN-GERST